170

(2)

No. 10-222

In The
Supreme Court of the United States

WYETH LLC, *et al.*,

Petitioners,

v.

SANDRA KIRKLAND, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The sole issue raised in the petition for a writ of certiorari is moot. Petitioners are challenging a decision of the Eighth Circuit holding that the district court lacked removal jurisdiction and directing it to remand these cases back to Minnesota state court. However, petitioners fail to mention that they never sought a stay of the Eighth Circuit's mandate, and the district court acted on the mandate months ago by remanding all of these cases to state court. Accordingly, a reversal of the Eighth Circuit's decision could not provide any effectual relief to petitioners. The Court should not grant certiorari just to render an advisory opinion on a moot issue.

Furthermore, this Court lacks appellate jurisdiction as a result of the remand orders. The remands to state court terminated federal court jurisdiction, and there is no right to appeal from a remand order. 28 U.S.C. § 1447(d). Petitioners are effectively seeking to have the remand orders undone after the fact. Under the removal statute, that is beyond the jurisdiction of the federal district court to accomplish or a federal appellate court to order.

Finally, there is no circuit conflict on the issue presented in the petition. The Eighth Circuit did not disagree with any other circuit on the validity or scope of the so-called "fraudulent misjoinder" doctrine. The court assumed the validity of both the doctrine itself and the "egregious" misjoinder standard of *Tapscott v. MS Dealer Service Corp.*, 77 F.3d

1353, 1360 (11th Cir. 1996). Based on this assumption, the court correctly found no fraudulent misjoinder of plaintiffs. Pet. App. 15a-19a. Petitioners' claim of a conflict is based solely on a handful of district court decisions that have rejected either the fraudulent misjoinder doctrine or the egregious misjoinder standard. Pet. 10-11 (citing district court cases). These conflicts between district court decisions do not warrant this Court's attention. *See* S. Ct. R. 10 (specifying conflicts between federal circuits and/or state courts of last resort).

For all these reasons, the petition for a writ of certiorari should be denied.

BACKGROUND

In three separate cases, a total of 123 women who developed breast cancer after taking hormone replacement therapy ("HRT") drugs sued Wyeth LLC ("Wyeth") and other defendants in Minnesota state court. The complaints alleged that plaintiffs' breast cancers were caused by HRT drugs, and that Wyeth and others had fraudulently concealed the causal link between breast cancer and HRT drugs at least until publication of the Women's Health Initiative ("WHI") study in July 2002.[1] AA 63-79, 179-96, 329-45. In each

[1] The WHI study was a landmark clinical trial by the National Institutes of Health that found a 26 percent higher incidence of breast cancer for women who took Wyeth's estrogen-progestin combination drug Prempro. AA 68-71. All 123 of the

(Continued on following page)

of the three cases, there were plaintiffs who were citizens of the same state as at least one of the defendants. AA 12, 153, 280-81.

Defendants removed all three cases to federal court, asserting that the plaintiffs in each case were improperly joined together to defeat diversity jurisdiction. AA 7-26, 150-63, 276-92. The district court denied plaintiffs' motions to remand the cases to state court, exercising diversity removal jurisdiction under the fraudulent misjoinder doctrine. AA 133-38, 258-62, 381-85. In a consolidated appeal from the final judgments, the Court of Appeals for the Eighth Circuit found no fraudulent misjoinder and reversed. The Eighth Circuit instructed the district court "to remand all of the cases to Minnesota state court for lack of diversity jurisdiction." Pet. App. 20a.

REASONS FOR DENYING THE PETITION

I. THE SOLE ISSUE PRESENTED IN THE PETITION IS MOOT

The Eighth Circuit rendered its decision on January 6, 2010. Pet. App. 4a. Petitioners did not seek a stay of the mandate either in the Eighth Circuit or this Court. In the absence of any request

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plaintiffs in these cases took either Prempro or an estrogen drug manufactured by Wyeth (most commonly Premarin) combined with a progestin drug manufactured by another defendant. AA 32-57, 173-74, 298-323.

for stay, the mandate issued in due course on March 19, 2010. Accordingly, on March 22, 2010, the district court complied with the mandate by remanding all of these cases to Minnesota state court and sending certified copies of the remand orders to the clerk of the state court. Copies of the district court's remand orders and its certified letters to the state court are included in the appendix to this brief.

Because these cases have already been remanded to state court, the jurisdictional issue raised by petitioners is now moot. An appeal is moot when, by virtue of an intervening event, the appellate court cannot grant any effectual relief in favor of the party seeking review. *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (citing *Mills v. Green*, 159 U.S. 651, 653 (1895)). Even if this Court were to reverse the Eighth Circuit and find that the district court was correct in its initial denial of the motions to remand, petitioners offer no procedural mechanism by which the district court could now reassert jurisdiction, undo its remand orders of March 22, 2010, and retrieve these cases back from Minnesota state court.

"It is axiomatic that remanding a case to state court terminates the jurisdiction of a federal bankruptcy or district court over the case." *Hunt v. Acromed Corp.*, 961 F.2d 1079, 1081 (3d Cir. 1992) (citations omitted). "The federal court is completely divested of jurisdiction once it mails a certified copy of the order to the clerk of the state court." *Id.* (citations omitted). "[E]ven if it decides the order was erroneous, a remand order cannot be vacated even by

the district court." *New Orleans Pub. Serv., Inc. v. Majoue*, 802 F.2d 166, 167 (5th Cir. 1986). And "there is no more reason for a district court being able to review its own decision, and revoke the remand, than for an appellate court requiring it to do so. *Both are foreclosed. . . .*" *In re La Providencia Dev. Corp.*, 406 F.2d 251, 252-53 (1st Cir. 1969) (emphasis added).

Petitioners easily could have requested a stay of the Eighth Circuit's mandate to preserve the status quo pending a final disposition of this petition. Fed. R. App. P. 41(d)(2). Having failed to do so, the remand orders are now water under the bridge. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills*, 159 U.S. at 653). Accordingly, the petition should be denied as moot.

II. THIS COURT LACKS APPELLATE JURISDICTION

Petitioners cannot achieve the relief they are seeking in this Court without somehow getting the district court to revoke its remand orders of March 22, 2010. As the foregoing authorities demonstrate, this is beyond the jurisdiction of the district court to accomplish or a federal appellate court to order. The removal statute provides that after a remand to state

court, "[t]he State may thereupon proceed with such case," 28 U.S.C. § 1447(c), and the remand order "is not reviewable on appeal or otherwise. . . ." 28 U.S.C. § 1447(d). These provisions embody a deliberate legislative "policy of not permitting interrupting of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946). Once a removed case has been remanded back to state court, and the district court's jurisdiction is terminated, the case must proceed on the merits in state court, and federal appellate courts have no jurisdiction to review the underlying jurisdictional issue.

For this reason, the district court's orders remanding these cases to Minnesota state court deprives this Court of jurisdiction to review the issues raised by petitioners regarding the fraudulent misjoinder doctrine. *See Anderson v. Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010) (finding no appellate jurisdiction to determine whether district court had removal jurisdiction under fraudulent misjoinder doctrine where cases had already been remanded to state court). Accordingly, the petition should be denied for lack of jurisdiction.

III. THERE IS NO CIRCUIT CONFLICT

Petitioners concede that "there is no clear conflict among the courts of appeal concerning the validity or scope of the fraudulent-misjoinder doctrine." Pet. 11.

Though true, this is an understatement. Not only is there no "clear" conflict, there is no circuit conflict of any kind. The fraudulent misjoinder doctrine and the egregious misjoinder standard were first adopted by the Eleventh Circuit in *Tapscott*, 77 F.3d at 1360. As the Eighth Circuit noted below, the Fifth and Ninth Circuits have acknowledged the doctrine without expressly accepting or rejecting it. Pet. App. 12a n.4 (citing *In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002); *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002); *California Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001)). No other circuit has expressed an opinion on the validity of the fraudulent misjoinder doctrine or the egregious misjoinder standard.

Nor did the Eighth Circuit's opinion create any circuit conflict on these issues. The court expressly stated:

> We make no judgment on the propriety of the doctrine in this case, and decline to either adopt or reject it at this time. Rather, on the record in this case, we conclude that even if we adopted the doctrine, the plaintiffs' alleged misjoinder in this case is not so egregious as to constitute fraudulent misjoinder.

Pet. App. 15a-16a. Thus, the Eighth Circuit assumed the validity of both the fraudulent misjoinder doctrine and the *Tapscott* egregious misjoinder standard.

Petitioners argue that even though there is no circuit conflict, this Court should grant certiorari to

resolve conflicts between the district courts over the validity and scope of the fraudulent misjoinder doctrine. They claim that certiorari is warranted "because of the difficulty in obtaining appellate review of a district court decision on fraudulent misjoinder." Pet. at 11-12. As this case illustrates, however, appellate review *is* available to challenge a district court's exercise of removal jurisdiction under the fraudulent misjoinder doctrine. Like any other interlocutory order, a district court's order denying a motion to remand, though not immediately appealable, is reviewable on appeal from the final judgment pursuant to 28 U.S.C. § 1291. *See, e.g.*, *Eastman v. Marine Mechanical Corp.*, 438 F.3d 544, 549 (6th Cir. 2006) (reversing final judgment for lack of removal jurisdiction and directing district court to remand case to state court). That is precisely how this case reached the Eighth Circuit. Thus, this issue is no more likely to evade appellate review than any other. Whenever a district court exercises removal jurisdiction under the fraudulent misjoinder doctrine, its decision will always be reviewable on appeal from the final judgment, like any other interlocutory ruling.

Furthermore, the conflict between district courts over the *Tapscott* "egregious" misjoinder standard is not significant enough to warrant this Court's attention. The overwhelming majority of district courts to follow *Tapscott* have adhered to its holding that "mere misjoinder" is not enough and the misjoinder must be

"so egregious as to constitute fraudulent joinder."[2] *Tapscott*, 77 F.3d at 1360. This includes MDL courts.[3] As *Tapscott* recognized, a misjoinder of parties cannot be considered "fraudulent" unless it is egregious enough to establish a deliberate "attempt to defeat diversity jurisdiction" by the plaintiff. *Id.* Petitioners

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[2] *See, e.g.*, *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684 (D. Nev. 2004) ("the majority of courts have held that the misjoinder must be 'egregious' to warrant severance, with some courts imposing a bad faith analysis into the standard"); *Texas Instruments Inc. v. Citigroup Global Markets, Inc.*, 266 F.R.D. 143, 147, 149 (N.D. Tex. 2010); *Bienemy v. Continental Cas. Co.*, 2010 WL 375213, at *4 (E.D. La. Jan. 26, 2010); *Wells Fargo Bank, N.A. v. American Gen. Life Ins. Co.*, 670 F. Supp. 2d 555, 559 (N.D. Tex. 2009); *Wyatt v. Charleston Area Medical Center, Inc.*, 651 F. Supp. 2d 492, 498-99 (S.D. W. Va. 2009); *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004); *Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868, 872 (S.D. Miss. 2004); *Bright v. No Cuts, Inc.*, 2003 WL 22434232, at *9 (E.D. La. Oct. 27, 2003) ("Courts analyzing fraudulent misjoinder claims under *Tapscott* have consistently noted that mere misjoinder does not constitute *fraudulent* misjoinder"). These cases also recognize that mere misjoinder is properly addressed to the state court in which the action was filed. *See, e.g.*, *Bright*, 2003 WL 22434232, at *9; *Johnson v. Glaxo Smith Kline*, 214 F.R.D. 416, 421 (S.D. Miss. 2002).

[3] *See, e.g.*, *In re Fossamax Prods. Liab. Litig.*, 2008 WL 2940560, at *4 (S.D.N.Y. July 29, 2008); *In re Bridgestone/Firestone, Inc.*, 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003); *In re Diet Drugs Prods. Liab. Litig.*, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999). No matter how desirable it may be to consolidate all state and federal cases relating to the same subject matter, "there is nothing in the applicable [MDL] statute to provide an exception to the rules normally governing removal of cases from state courts." *BancOhio Corp. v. Fox*, 516 F.2d 29, 32 (6th Cir. 1975).

are asking this Court to adopt the contrary view of a small minority of federal district courts that have rejected the *Tapscott* standard of egregious misjoinder in favor of a rule that "mere misjoinder" of parties in state court can create federal diversity jurisdiction. Pet. 10-11 (citing cases). "This latter path goes far beyond the standard even for fraudulent joinder. . . ." Ronald Parsons, *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L. Rev. 52, 66 & n.115 (2008); *see also* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 612-13 (2006) (rejecting "mere misjoinder" standard). Because the overwhelming majority of federal district courts applying the fraudulent misjoinder doctrine have followed the *Tapscott* egregious misjoinder standard – and there is no circuit conflict on the issue – the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Aug. 2010

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re: **MDL Docket No. 4:03CV1507-WRW**
4:08CV04196

PREMPRO PRODUCTS LIABILITY LITIGATION

SANDRA KIRKLAND, et al. **PLAINTIFFS**

v.

WYETH, et al. **DEFENDANTS**

ORDER

Based on the Court of Appeals for the Eighth Circuit's January 6, 2010 Order and Judgment,[1] my December 29, 2008 Order (Doc. No. 29), is VACATED. Accordingly, Plaintiffs' Motion to Remand (Doc. No. 22) is GRANTED and Defendants' Motion to Dismiss Duplicative Cases (Doc. No. 25) is DENIED as MOOT.

This case is REMANDED to Hennepin County, Minnesota District Court.

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[1] Doc. Nos. 40, 41. The Mandate was issues [sic] on March 19, 2010.

IT IS SO ORDERED this 22nd day of March, 2010.

/s/ Wm. R. Wilson, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
OFFICE OF THE CLERK
600 WEST CAPITOL AVENUE
Room A149
LITTLE ROCK, ARKANSAS 72201

JAMES W. McCORMACK
CLERK

OFFICE (501) 604-5312
FAX (501) 604-5139

March 22, 2010

Via Certified Mail 7099 3400 0015 8090 2531

Clerk
Hennepin County District Court, Civil Division
Suite #C-332
300 South 6th Street
Minneapolis, Minnesota 55487-0332

Re: Sandra Kirkland, et al v. Wyeth, et al
USDC, Eastern District of Arkansas
Case No. 4:08-cv-04196 WRW
Hennepin County Case No. 0:08-cv-04826

Dear Clerk:

Enclosed please find a certified copy of the Order entered today by United States District Judge William R. Wilson, Jr. regarding the above-referenced case. Pursuant to this Order, this case has been remanded to the Hennepin County District Court. Also enclosed is a certified copy of the docket sheet and copies of the pleadings filed since the removal of this case to the United States District Court, District o [sic] Minnesota on December 5, 2008, and its

subsequent transfer to our Court by the Multidistrict Litigation Panel.

If you have any questions, please contact me at (501) 604-5394.

Sincerely,

JAMES W. McCORMACK, Clerk

/s/Martha Fugate

By: Martha Fugate, Deputy Clerk

Enclosures

Enclosure

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re: **MDL Docket No. 4:03CV1507-WRW**
4:08CV04195

PREMPRO PRODUCTS LIABILITY LITIGATION

RICK JASPERSON, et al. **PLAINTIFFS**

v.

WYETH, et al. **DEFENDANTS**

ORDER

Based on the Court of Appeals for the Eighth Circuit's January 6, 2010 Order and Judgment,[1] my December 29, 2008 Order (Doc. No. 29), is VACATED. Accordingly, Plaintiffs' Motion to Remand (Doc. No. 22) is GRANTED and Defendants' Motion to Dismiss Duplicative Cases (Doc. No. 25) is DENIED as MOOT.

This case is REMANDED to Hennepin County, Minnesota District Court.

---

[1] Doc. Nos. 39, 40. The Mandate was issues [sic] on March 19, 2010.

IT IS SO ORDERED this 22nd day of March, 2010.

/s/ Wm. R. Wilson, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
OFFICE OF THE CLERK
600 WEST CAPITOL AVENUE
Room A149
LITTLE ROCK, ARKANSAS 72201

JAMES W. McCORMACK
CLERK

OFFICE (501) 604-5312
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March 22, 2010

Via Certified Mail 7099 3400 0015 8090 2517

Clerk
Hennepin County District Court, Civil Division
Suite #C-332
300 South 6th Street
Minneapolis, Minnesota 55487-0332

Re: Rick Jasperson, et al v. Wyeth, et al
USDC, Eastern District of Arkansas
Case No. 4:08-cv-04195 WRW
Hennepin County Case No. 0:08-cv-04826

Dear Clerk:

Enclosed please find a certified copy of the Order entered today by United States District Judge William R. Wilson, Jr. regarding the above-referenced case. Pursuant to this Order, this case has been remanded to the Hennepin County District Court. Also enclosed is a certified copy of the docket sheet and copies of the pleadings filed since the removal of this case to the United States District Court, District o [sic] Minnesota on December 5, 2008, and its

subsequent transfer to our Court by the Multidistrict Litigation Panel.

If you have any questions, please contact me at (501) 604-5394.

Sincerely,

JAMES W. McCORMACK, Clerk

/s/Martha Fugate

By: Martha Fugate, Deputy Clerk

Enclosures

Enclosure

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re: **MDL Docket No. 4:03CV1507-WRW**
4:09CV00104

PREMPRO PRODUCTS LIABILITY LITIGATION

DOROTHY ALLEN, et al. **PLAINTIFFS**

v.

WYETH, et al. **DEFENDANTS**

Based on the Court of Appeals for the Eighth Circuit's January 6, 2010 Order and Judgment,[1] my February 10, 2009, Order (Doc. No. 31), is VACATED. Accordingly, Plaintiffs' Motion to Remand (Doc. No. 29) is GRANTED.

This case is REMANDED to Hennepin County, Minnesota District Court.

IT IS SO ORDERED this 22nd day of March, 2010.

/s/ Wm. R. Wilson, Jr.
UNITED STATES
DISTRICT JUDGE

---

[1] Doc. Nos. 39, 40. The Mandate was issues [sic] on March 19, 2010.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
OFFICE OF THE CLERK
600 WEST CAPITOL AVENUE
Room A149
LITTLE ROCK, ARKANSAS 72201

JAMES W. McCORMACK
CLERK

OFFICE (501) 604-5312
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March 22, 2010

Via Certified Mail 7099 3400 0015 8090 2524

Clerk
Hennepin County District Court, Civil Division
Suite #C-332
300 South 6th Street
Minneapolis, Minnesota 55487-0332

Re: Dorothy Allen, et al v. Wyeth, et al
USDC, Eastern District of Arkansas
Case No. 4:09-cv-00104 WRW
Hennepin County Case No. 0:08-cv-04827

Dear Clerk:

Enclosed please find a certified copy of the Order entered today by United States District Judge William R. Wilson, Jr. regarding the above-referenced case. Pursuant to this Order, this case has been remanded to the Hennepin County District Court. Also enclosed is a certified copy of the docket sheet and copies of the pleadings filed since the removal of this case to the United States District Court, District o [sic] Minnesota on February 10, 2009, and its

subsequent transfer to our Court by the Multidistrict Litigation Panel.

If you have any questions, please contact me at (501) 604-5394.

Sincerely,

JAMES W. McCORMACK, Clerk

/s/Martha Fugate

By: Martha Fugate, Deputy Clerk

Enclosures

Enclosure